SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL
DEPARTMENT

DECISIONS FILED

NOVEMBER 15, 1995

HON. M. DOLORES DENMAN, PRESIDING JUSTICE

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JOHN F. LAWTON

HON. LEO J. FALLON

HON. RICHARD C. WESLEY

HON. JOHN J. CALLAHAN

HON. JOHN E. DOERR

HON. JOHN P. BALIO

HON. REUBEN K. DAVIS

HON. DAVID O. BOEHM, ASSOCIATE JUSTICES

CARL M. DARNALL, CLERK

1671. (Oneida Co.) — TWAINA C. WATKINS, APPELLANT, V CITY OF UTICA, RESPONDENT. — Order unanimously affirmed without costs for reasons stated in decision at Supreme Court, Tenney, J. (Appeal from Order of Supreme Court, Oneida County, Tenney, J. - Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1677. (Onondaga Co.) — ALFRED W. BOYLE, RESPONDENT, V JOHN L. MANNIX, APPELLANT, AND CHRIS TARRO, RESPONDENT. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Pooler, J.— Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1681. (Oneida Co.) — RICHARD CARNEY, APPELLANT, V DUXBAK, INC., AND UTICA DUXBAK CORPORATION, RESPONDENTS. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Oneida County, Murad, J. - Labor Law.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1683. (Onondaga Co.) — JAMES GRAHAM, APPELLANT, V NIAGARA MOHAWK POWER CORPORATION, RESPONDENT. — Order unanimously affirmed without costs. (Appeal from Order of Supreme Court, Onondaga County, Hayes, J. - Summary Judgment.) PRESENT: GREEN, J. P., PINE, FALLON, CALLAHAN AND DOERR, JJ. (Filed Nov. 15, 1995.)

1686. (Genesee Co.) — PEOPLE OF THE STATE OF NEW YORR, RESPONDENT, V THOMAS K. DE SALVO, APPELLANT. — Judgment unanimously affirmed. Counsel's

application to withdraw granted (see, *People v Crawford*, 71 AD2d 38). Memorandum: Defendant's sentence must be consecutive (*see*, Penal Law § 70.25 [2-a]). (Appeal from Judgment of Genesee County Court, Morton, J. — Attempted Burglary, 3rd Degree.) PRESENT: LAWTON, J. P., WESLEY, BALIO, DAVIS AND BOEHM, JJ. (Filed Nov. 15, 1995.)

1689. (Erie Co.) — MATTER OF JOSEPH GREANY, APPELLANT, V FRANK E. IRVIN, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, THOMAS A. COUGHLIN, III, COMMISSIONER, NEW YORR STATE DEPARTMENT OF CORRECTIONAL SERVICES, RESPONDENTS. Judgment unanimously affirmed without costs. Memorandum: The contention of petitioner that he was denied due process as well as the right to call witnesses is without merit. At petitioner's rehearing, the Hearing Officer was unable to obtain the presence of two persons petitioner had requested as witnesses but was unable to identify. The Hearing Officer advised petitioner that he was unable to ascertain the identities of those witnesses because the Department of Correctional Services lacked a tracking mechanism to determine who was in a particular cell on a given day and further stated that the prisoner log book did not contain the names or current location of those witnesses. Thus, the record establishes that a sufficient attempt was made to identify the witnesses: "[n]either the departmental regulations nor due process require[s] a more extensive search" (*Matter of Law v Racette*, 120 AD2d 846, 848).

We reject the contention of petitioner that respondent violated 7 NYCRR 254.5 (b) by taking a witness's testimony via speakerphone. There is no requirement that a witness be

physically present when testifying at a Tier III disciplinary hearing. Petitioner's speculation that the person on the speaker-phone was not the witness that he had requested has no support in the record.

The further contention of petitioner that his hearing was untimely because it was not held in accordance with 7 NYCRR 251-5.1 is without merit. Supreme Court directed that the rehearing be commenced within 14 days of its order and completed within seven days thereafter (*cf., Matter of Hawkins v Scully*, 146 AD2d 627), and it is uncontested that the hearing was commenced and completed within that time frame.

With respect to petitioner's five remaining contentions, petitioner failed to exhaust his administrative remedies regarding three of them by not raising them at the Superintendent's hearing (*see, Matter of Nelson v Coughlin*, 188 AD2d 1071, *appeal dismissed* 81 NY2d 834), and the others were rendered moot when the determination in the first hearing was reversed and the penalty expunged (*see, Matter of Hearst Corp. v Clyne*, 50 NY2d 707).